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100th Congress
1st Session

HOUSE COMMITTEE PRINT NO. 9

PROCEEDINGS OF THE 41ST ANNUAL CONVENTION OF THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF VETERANS AFFAIRS ON JUDICIAL REVIEW OF VA ADMINISTRATIVE DETERMINATIONS

PREPARED BY THE

COMMITTEE ON VETERANS' AFFAIRS

OF THE

U.S. HOUSE OF REPRESENTATIVES

100TH CONGRESS

DECEMBER 10, 1987.—Printed for the use of the Committee on Veterans' Affairs of the House of Representatives

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U.S. GOVERNMENT PRINTING OFFICE

78-972 WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
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FOREWORD

At the 41st Annual Convention of the National Association of State Directors of Veterans Affairs held in Atlantic City, New Jersey, September 13-17, 1987, representatives of the veterans service organizations presented their views on the topic of expanding judicial review of veterans' claims.

This Committee Print contains the views of the veterans service organizations which were represented at the Convention.

STATEMENT OF RICHARD J. GALLANT, NATIONAL SERVICE DIRECTOR, MILITARY ORDER OF THE PURPLE HEART

Mr. President, distinguished guests, Directors and Commission members of the State Department of Veterans Affairs. Thank you for the opportunity to be with you today and to be able to present to you our views on "judicial review".

For almost a decade, I have had the privilege of attending and participating in your annual conference. All of your sessions have been extremely productive, informative, and address issues that are of importance to all veterans. Your selection of "judicial review" for today's seminar is a most appropriate and topical subject for discussion.

Before presenting the position of the Military Order of the Purple Heart as it relates to judicial review, I want to take this opportunity to extend to each and everyone of you the appreciation of the Purple Heart for your support and for your outstanding service to the veterans, their dependents and their survivors who reside in your respective States. Within your respective State, you represent perhaps one of the most powerful forces in the country for the delivery of services and program development for veterans.

You represent the Governor, and your legislature, as well as the veterans in your State. The veterans look to you for leadership, in the development and presentation of new and innovative programs and services, and to be their voice in your State government. A big responsibility lies upon your shoulders, being a veteran's advocate in your respective State.

We all recognize the economics that relate to the provision of services and programs to our veterans. The demands from special interest groups have not declined; if anything, they have increased.

The wisdom of one of our legislators, Olin Teague, really the grandfather of veterans' legislation, warned the veterans, that one day, the funding for veterans' programs and services would reach a no-growth period. Also, that veterans would have placed upon them a grave responsibility on how the available funds should be distributed. I believe we have probably reached that point. No matter how you address the issue of the Veterans' Administration (VA) annual budget, no matter how you use the numbers, or the statistics, the VA budget for the past several years has been running pretty close to a flat budget. Regardless of how much the dollar amount increases, the costs of operations and the demands for services increase disproportionately to the moneys allocated.

With that in mind, in my opinion, it places upon all of us a grave responsibility as to how do we recommend the distribution of the available funds, and those available services and programs that they can purchase.

In my opinion, there is no greater group of citizens that deserve priority of interest and consideration by our President and our

elected Members of the United States Congress than our veterans. We are celebrating the 200th anniversary of our Constitution. If it were not for the sacrifices by our veterans, there would, in all probability, be no celebration today. Veterans only ask for fair and equitable treatment in recognition of their honorable service.

The only thing I would like to say in that vein, is for you to look back and ask the questions, "Why do we have a Veterans' Administration?" "Where did it come from?" I believe the basic response is that it was established and developed first and foremost to take care of those combat soldiers who were wounded, injured, or maimed physically or mentally as a result of combat against an armed enemy of the United States.

We have come a long way since its inception, and rightfully so. We are now providing care to a great many of our veterans in need. We owe this to the wisdom of our legislators who recognize and respect the sacrifices of all of our veterans.

However, when the cheese gets binding—if we want to use that expression—don't forget the main reason why we have this organization, the Veterans' Administration.

Back to the subject at hand, judicial review, it is interesting, it is controversial, and it requires a great deal of objectivity in its value analysis. During our discussion on judicial review, we must respect each others views, because we all have the best interest of our veterans and our Nation at heart. But, when you make the final decision on the way you're going to go, or to be heard on the issue of judicial review, be cold, be objective. Ask yourself, am I satisfying a few to the detriment of the many? Is judicial review everything that it appears to be? You have to make your own decision. In making your decision, do not fall into that trap of contemporary society—litigious.

Because of our topic, I have prepared my presentation in the hope that it would be thought provoking, balanced, and substantiating in regards to the position of the Military Order of the Purple Heart. Normally, I use a few notes to deliver a presentation, but today, because of the seriousness and importance of this issue, I will read my prepared remarks in detail, and they are as follows:

The Military Order of the Purple Heart fully recognizes and believes it understands the emotions that the subject judicial review brings to the surface as it relates to the successful pursuit of a veteran's claim for benefits from the Veterans' Administration.

To present our position on the subject of judicial review, I would like to present a lead in to our position.

Currently, decisions of the Board of Veterans Appeals are final with no review by the court except in certain limited circumstances (contracts like insurance and loan guaranty and constitutional questions). Historically, this had its origin in the concept that veterans' benefits were not a matter of right but gratuities from a grateful government. The system was designed to be generous to the veteran and to minimize formalities. Technicalities associated with traditional judicial procedures were to be avoided such as formal rules of evidence and adversary proceedings requiring special advocacy skills. A fee limitation was imposed to preclude significant participation by attorneys who were perceived as having victimized veterans while pursuing claims against the Government

for benefits following the Civil War. In total, the administrative process as opposed to the judicial was viewed as faster, less expensive and more practical. Also, that it was desirable to have the claims decided out of the expertise which develops in people when a subject is focused on over an extensive period of years.

The system which now stands was essentially finalized over 50 years ago and has worked to general satisfaction. However, in recent years, critics have surfaced arguing a need for judicial review of VA and Board of Veterans Appeals Decisions. They concede that the VA does not deliberately or otherwise reach unfair decisions; but regardless, a judicial oversight of the actions of any Government agency is the right of all Americans, particularly those who fought its wars. They argue as their root reason for judicial review, that no agency should be allowed to make decisions unchecked outside itself—and it is around this basic concept proponents have fashioned their supporting arguments.

They have been sufficiently persuasive that a bill providing for judicial review passed the U.S. Senate, but a similar bill failed in the U.S. House of Representatives Veterans' Affairs Committee. It appears that judicial review has become a bipartisan question. And, it probably will be again in the forthcoming 101st Congress.

Veterans service organizations have for the most part opposed judicial review until recent years when some expressed interest but on additional consideration reverted to opposing it in general, or at least the bills before Congress. Today, you have or will be hearing from the veterans organizations their current view.

Why, some ask, would veterans' advocates oppose what many claim is a fundamental American right; a person's day in court, particularly to the individuals who bore the battle to protect our constitutional heritage?

Well—as appealing as patriotic and constitutional entreaties are, the issue must be decided on the merits, and in any evaluation of the merits of judicial review, the primary concern must be the interest of the veteran. Supporters of the present system believe this is what went into its development. They are critical of judicial review, calling it a lawyer's relief act. They recognize the oversight of Veterans' Administration actions by the Congress, confident the VA would be quickly brought to heel should it begin to act against the interests of the veteran and not in its present role as veterans' advocate. It is feared that despite the best efforts of a bill's drafters, judicial involvement invites adversary proceedings. Courts are known to order adversary proceedings on the agency level in order to build a record on which to make a decision. They are not used to the ex parte or single-party proceedings enjoyed by veterans.

Critics of judicial review anticipate the VA's retreat from its traditional veterans' advocate role as it seeks to protect itself from courtroom attacks. They also see it as inevitable that lawyers will enter the process long before any formal judicial proceeding and exploitation of the veterans for fee purposes. Critics look to judicial review and its abysmal role in the administration of social security benefits. Imagine, they say, the problems the VA will have in attempting to respond to the inconsistent rulings of the 96 U.S. District Courts and the 13 Circuit Courts of Appeal. There is concern also as to what extent court precedents will limit the independence

of the Board of Veterans Appeals' action leading to favorable decisions.

Opponents of judicial review note there is no constitutional right to judicial review and the Supreme Court has made this abundantly clear. In fact, they observe that the Judicial Conference of the United States opposes such review noting there is no evidence the present system is unfair to veterans and that the modern trend is to avoid the courts in certain dispute situations in favor of alternative means.

Most service officers, those persons most intimately associated with veterans in the claim process, are said by many of their service organization employers to recognize the present system is weighed in favor of the veteran and to tamper with it may be to his detriment. The bottom line to the advocates of the present system is "if it isn't broken, don't fix it".

Many of you have seen a large number of veterans' claims. Of all the claims that you have seen, how many do you objectively believe demand judicial review? Are there not other remedies available? It would be interesting to have the proponents of judicial review present the claims that they identify as requiring judicial review proceedings to a qualified committee for an unbiased evaluation.

We have grave concern over any piece of proposed legislation if the proponents of that bill and the potential recipients of that law are unable to reasonably answer the following questions. We have been seeking answers to these questions for the past 2 years. The only substantive response has been from the office of a prime sponsor of the proposed legislation that the "committee" will have to answer or work out the questions.

It will be greatly appreciated if anyone here today can provide the answers to these questions. They are:

1. Will the veteran be required to exhaust all avenues of appeal before coming to the courts?
2. The VA is presently considered to be the veteran's advocate. Will judicial review change the VA into an adversary?
3. In cases where the law is somewhat ambiguous, as in radiation and herbicide exposure, residuals and other secondary effects, can the courts be expected to clarify existing law? If the answer is yes, there is more concern about direction.
4. How will rules of evidence apply in these cases, and more so, in those cases where the law permits presumption?
5. In any area where the court may possibly take a liberal attitude, in radiation claims for one example, can we expect a flood of dependent claims to follow?
6. Can VA regulations be challenged and perhaps changed in such a way so as to conform to the social security version of disability?
7. The recent court settlement on Agent Orange claims has the court setting many guidelines, including a definition of disability that resembles social security, a ruling of all or nothing. Is there any leeway in the judicial review proposals that permit the same type of action by any court?
8. Looking at current VA data, we can estimate the potential appeals to the court at about 10,000 or less. Where will the funds come from to cover the expense of the court? From

Justice, or from VA? Could it possibly impact on any other of the veterans' programs and benefits? Further, will the potential number of cases justify the costs?

9. Much has been said about "accepted medical standards", and we often hear of what is not acceptable. Will judicial review further define and clarify these standards? The regulations will sometimes differ from current medical knowledge that is based on research. Will judicial review force a change in regulations, or in disability ratings, due to increased knowledge?
10. In certain types of claims for treatment, or benefits, where substance abuse is involved, will a court look at this as an illness, or as willful misconduct?
11. What do you anticipate as the most typical examples of claims that may come before the courts?
12. Some people have mentioned the possibility of lawsuits against service organization representatives, potentially in cases where a veteran may be denied benefits right up to the BVA, but then get an award from a court in appeal. Would the possibility of malpractice suits, or negligence suits against service organizations exist under the proposed judicial review?
13. Do you anticipate any problems in claims or appeals where existing medical knowlege is limited? A prime example is in tropical medicine. Few such specialists are available in or out of the VA system.

The Military Order of the Purple Heart at this time does not support judicial review. Without sounding as wavering, we also reserve the option and have an open mind and will continue to evaluate any and all proposals as they are presented.

Thank you for the opportunity to speak to you today.

STATEMENT OF ROBERT LYNGH, NATIONAL REHABILITATION AND SERVICE DIRECTOR, THE AMERICAN LEGION

When Leo called me and asked me to talk to you this morning a little bit about judicial review, I'm not going to take too much to do that because I think that the issue has almost literally been beaten to death. And when I think about the debate that continues on the subject of judicial review I think we have a parallel in the situation, for example in the national debate that is going on about abortion. By which I mean that we have reached a point on judical review as they have on the abortion debate where to all intents and purposes no minds are being changed. People have staked out their positions in the field of abortion for example and those who are in favor of it are going to stay in favor of it and those who are opposed are going to stay opposed and neither side is really listening to each other and nothing is really going to change and that battle is going to continue to go on. We're almost in the same situation with reference to judicial review. Those who are in favor of it are absolutely or totally convinced that they have the right and those who are opposed to it, are opposed to it for reasons that they consider good and sufficient and they are not about to change their minds.

I have made presentations on behalf of my organization before congressional committees on so many occasions that I assure you in all sincerity that I could go before any congressional committee today and present effective arguments on both sides of the issue. We go through what is pretty much a rain dance at intervals before the congressional committees. We have not had a hearing for example this year as yet. Those who are the proponents of the judicial review bills that are pending, are plotting their strategy and it is my perception that they do not plan to call hearings this year, during this session, because we're almost at the end of the 1987 session of the 100th Congress. I would expect that they probably will call hearings next year as they have done in the last several years. They have called hearings during the second year of the Congress and, as I say, we go through pretty much of a rain dance in which they call the hearings, we all march up to the Hill and pro and con we state our case and then they have some in-fighting within the committee structure itself and they take a vote which on the House side usually results in the legislation not being reported to the floor, and so, nothing is done.

The whole issue as far as we are concerned in The American Legion on judicial review resolves itself into one simple question and what I am about to explain to you is the reason why, in my judgment, no minds are ever really going to be changed. The entire issue on judicial review revolves around the phrase "due process". Every American is entitled to due process, that is a constitutional right, when he seeks relief from his or her government on some issue that is important to him or her as an individual. The question then is do veterans in the process that has been established with reference to the benefits program, do they in fact receive due process through the present adjudicative process or do they not?

The proponents of judicial review say very flatly that they do not. The opponents of judicial review on the contrary believe that they do in fact receive due process as that term is closely defined. As far as The American Legion is concerned, ladies and gentleman, let me say that we base our stand on the fact that we have been in the business of assisting veterans get their benefits from the Federal Government for nearly 70 years. We have handled literally untold thousands of claims as advocates for the veterans. We will stand on the fact that our credibility as a veterans' representative in the city of Washington is unsurpassed. We believe, therefore, that we have the knowledge, the background, the expertise, the credibility, and the right to stake out a position and to say on the basis of our judgment evolving from our experience in the business whether in fact veterans do receive due process.

It is our conclusion based on everything that we have heard and experienced to this time, that veterans do in fact receive more consideration on a more agreeable basis that is potentially favorable to their interests under the present adjudicative process than they would if the ultimate decision on all cases were placed within the context of the Federal judicial system. Now the reason I'm not going to go through all the arguments is because we've been through them all before and Dick Gallant gave you some of them when he was just up here and some of the other representatives are going to give them to you also, and you get into the adversary

system, and you get into the rules of evidence, and you get into arbitrary and capricious decisions by the judges or by the Veterans' Administration, and you can argue them back and forth until hell freezes over and you're not going to get anyplace because it depends on the point from which you are coming.

Let me just say to you that some of the proponents of the judicial review as far as we are concerned represent nothing and nobody and they haven't done anything that is visible to people in general to develop any credibility that would entitle them to take the position they do. You have organizations who have made an entire cause out of creating the issue of judicial review in this country that have never handled one damn case before a VA rating board at a regional office much less before the Board of Veterans' Appeals. Most of their representatives couldn't go through a case file and tell you how to develop the claim. The only thing they have any expertise on, self-identified and self-appointed, is, "we know that judicial review is the answer to all problems that the veterans have in this country." It's ridiculous.

Now don't misunderstand me, I am not telling you they don't have the right to say what they say. It's a free country, they can say any damn thing they want to, but the mere fact that they say it does not, what I'm saying to you ladies and gentlemen, lend any weight to what they're saying, because it isn't built upon any foundation of knowledge or experience in this business. The other veterans' organizations with a history of service to this country can take the same position that I do. They might not want to be so frank about it, but they are in the same position that we are from the standpoint that we are doing the work, we have done the work, we're continuing to do the work, we understand how the work is done, and I am here to tell you that as far as The American Legion is concerned we believe that we win more cases in the Veterans' Administration under the present system than we would be able to do if we had to operate in a climate that involved an adversary relationship between the United States Government and the veteran who is seeking the benefits.

I'll conclude, if I may, by reading you just a few, two or three, of the "whereas" clauses in the resolution that now controls our position on this subject. We have a standing mandate in our mandate portfolio which places The American Legion in opposition to judicial review. The "resolve" clause of that resolution, I'll read before I read the "whereases," and I read the whereases because they are explanatory and they in a sense reinforce what I have just told you. The resolve clause reads that The American Legion shall continue to oppose the enactment of any measure that would amend 38 U.S. Code 2:11A so as to authorize judicial review of the decisions of the Administrator of Veterans' Affairs except as presently authorized and 38 U.S. Code 7:55 and 7:84 and chapter 37 of such title.

Those exceptions, as you may or may not know, refer in the main to insurance matters which are of course a contractual relationship between the policy holder and the insurer, which is the Federal Government, and in all contract matters there has to be access to litigation in defense of the contract. Let me read just two or three of the whereas clauses that support that resolve clause if I

may. Third whereas clause in our resolution reads: "The experience of The American Legion in more than 60 years of claims work has demonstrated that the present system of claims that is administered by the VA works to the best advantage to the claimant in that it does not involve cost to the veterans, is not an adversary proceeding, and permits the informal presentation of evidence that operates to the advantage of the claimant."

The seventh whereas clause reads: "The changes in adjudication of veterans' claims included in the pending legislation would mandate and enhance a legal adversary relationship betwen the Veterans' Administration and veteran, requiring that the veteran have an attorney represent him/her in the proceedings." The eighth whereas clause reads: "Under this proposal the appeals system would become more rigid, less sympathetic to the veteran, require large expenditures for attorney's fees, lose the present informality the veteran enjoys, increase time delays in the appeal process because of filled court calendars, and make the VA an adversary to the people it is supposed to serve." And finally, if I may, the tenth whereas clause reads: "The prospect (now hear me on this), the prospect of the claimant paying in any fashion to obtain any benefits due him from the Government he has served as would have to be done in the instance of litigation is abhorrent to The American Legion." On this, ladies and gentlmen, speaking for The American Legion, we rest our case.

STATEMENT OF LT. COL. DAVID PASSAMANECK, USA (RETIRED), NATIONAL LEGISLATIVE DIRECTOR, AMVETS

On 7 October 1977, after historically opposing repeal or amendment of Title 38 United States Code, section 211(a), that is the provision which precludes judicial review, the VA reported to the Senate Committee on Veterans' Affairs that they "no longer opposed limited judicial review of individual benefit decisions". The VA held to this position until 15 July 1981, right after the inauguration of the Reagan administration, when they again reported to the Senate committee, "that any proposed legislation which would generate additional expenditures of Government funds, particularly in increasing the staff of the VA and the administrative burden upon the agency, should be examined with great circumspection". They then went on to oppose S. 349, 97th Congress, which was the judicial review bill which was then pending and is essentially the same as the others which have been passed in various Senates but not in the House.

During that period, AMVETS, like some of the other organizations, was in favor of judicial review having taken a position which was sort of a popular one for many years without paying too much attention to it because it was one of those things sort of like being in favor of motherhood and the 4th of July, and maybe it would never happen, but it was a good thing to say that we liked judicial review. We really hadn't put any strong intensive analysis on the subject. In any event we continued to support judicial review until we informed the House Committee on Veterans' Affairs that regardless of the arguments that had been advanced over the years

for and against judicial review, and I'd like to point out that there are persuasive considerations on both sides, that at that juncture, that is back in 1986 and it is true today too, of extreme budgetary constraint, the possible advantages of subjecting the Veterans' Administration adjudicative system to the judicial process were so problematic and tenuous, and the proven merits of the current system so obvious, that it would be the height of irresponsibility to generate the costs, inefficiencies and delays necessary to an adversary litigation system.

That essentially is the position that we still maintain today. It is interesting to point out, and I am glad that my friend Bob Lyngh went into this and I'm not afraid to go into it either, that when the hearing took place last summer on this issue the thing that concerned Mr. Edwards, Mr. Daschle and the other people of the committee who were with him, the pro judicial review, people, more than anything else as far as my testimony was concerned, was not what the position of AMVETS was on judicial review, they didn't care about that. What was really bothering them was the fact that we had taken a contrary position before 1986 and that we had the utter gall and nerve to change our minds and they spent at least 2 to 3 hours arguing with me about the internal constitutional requirements and procedures of AMVETS saying how did you have the authority to do this, and how come this, that and the other thing implying that the policy change was done in some way under the table and behind everybody's back or in a closet or something else in violation of our own constitutional procedures.

I went into, of course, great detail pointing out provisions of our constitution and by-laws showing that things had been done by action of the national executive committee, and that it was subsequently confirmed by the national convention, but of course it did not seem to hold any water. We were still the bad guys because we had the nerve to change our minds. Very rarely did any of the discussions get into the merits or demerits of judicial review. It was all about how bad we were for having changed our position. And this of course was made even more dramatic by the fact that in my usual colorful fashion the year before I gave a rather effective speech which is probably one of the best defenses of judicial review I have ever heard. So they started throwing that language back at me. It was an interesting situation.

In any event, last year we did take the position that we now have and intend to hold indefinitely, or at least for the next few years, as you will see in a minute. We stated that AMVETS recognizes the current VA appellate system as being a unique example of objectivity, honesty, compassion and fairness among all other government administrative agencies. We have a system which is enthusiastically approved by veterans and their families, and which approval is being expressed unequivocally by almost all of the organizations to which they belong. In short, we have a system which works well. There is no need to fix it. I appreciate the fact that Dick Gallant pointed out that the latest and most progressive development in the area of private law is the use of arbitration, the use of private adjudication, etc., written into contracts to avoid having to go into the court system. The progressive practitioners in the legal profession know what it takes to get into court, they

know what it cost, they know the years of delay, they know that you could be wiped out even if you win the case and so in so many areas in private law today, in contract, in business, etc., arbitration and adjudication clauses are written right into these contracts so these people can avoid going to court. They don't want to go to court.

We have a system like that already in the VA which is established by law, why should we get out of it and go back to court and spend 5 years to settle a question which the VA system can settle in a matter of months and in no way more satisfactory? AMVETS believes that to subject the VA adjudicative system to the frustrations, prohibitive expense and the precedential chaos of the Federal court system would destroy the best administrative adjudicative system in the government for the sake of a largely cosmetic deference to an ideal of due process. All we have to do is look at the lucrative social security and black lung practice to obtain some idea of what the VA claims business will be like if any level of the adjudicative system is reserved for lawyers. And I want to point out here, by the way, that the cost that will be imposed is not only on the VA because they are going to have to hire three times as many people for Don Ivers than he has already and that's going to cost a lot of money, but there is going to be a heck of a lot of cost imposed on the veterans service organizations if they want to remain in the business of representing veterans effectively because we don't want to take cases through the system to go to the BVA and then have to turn to our clients and say that's the end of the line as far as the AMVETS is concerned, we can't represent you any further.

Service organizations, from now on you will have to go out and spend money and hire a lawyer if you want to go to court, because that's the next stage in the system. We are not going to be able to do that, we don't want to do that. We want to be able to have complete effective representation for these veterans all the way up the line and if the last step in the line means going into the Federal court system, that means that the veterans service organizations are going to have to hire lawyers on their staffs for high fees or high pay because lawyers don't work for the same kind of money that service officers work for.

Of course, I am one of these guys who, if I retire this year or the next year, I'll probably get retainers from two or three veterans organizations, and make myself a nice pile of money but I'm going to be the one that will benefit from that, and other lawyers like myself who have been in this business, not the veterans. I don't know what effect this will have but we better think very clearly and very long about the effect it is going to have on the financial structure of our service organizations. We don't have all that much money, we're talking about retainers involving $200,000 or $300,000 a year or something of that sort to handle the cases that may be coming through because we don't want to have to tell our clients you have to pay for your own appeal into the Federal court system. We want to say we'll do it for you just like we do it all along the line.

Let's not forget, and we pointed this out in 1986, that we have an extreme excess of lawyers in this country. They are not all part-

ners in prestigious law firms, and believe it or not, most of them are earning between $18,000 to $20,000 a year on their law practice, and this may even be a generous estimation. Make no mistake about it. Exposing the VA claims adjudication system to the Federal judicial mechanism would serve the interests of lawyers almost exclusively. The fees, which would be siphoned off the awards in arrears, could be inflated out of all sensible proportion by the endless pretrial discovery practice alone.

Because you see that is what separates the men from the boys in the legal profession today. It isn't who wins or loses in the end, it is how long the other side can keep sending interrogatories to you and how many times they can haul you in for depositions and how much money you can spend in order to take care of this thing and sooner or later the guy who gets weaker gives up. When Monsanto Chemical Company and the others decided to settle in the Agent Orange case when there was absolutely no proof of liability at all as the judge pointed out, they did it because they said if we give them $130 million to settle this case now we save $500 million in pre-trial discovery cost paying off these lawyers. It would be cheaper right now, even if there is no liability, to settle. And that's exactly what they did, and that is exactly what everybody else is going to have to do along the line because you don't win a law case today by getting a judgment.

You win it by imposing procedures expenses on your opponent and that is exactly what's going to happen with judicial review. Under the current system some cases, of course, are decided against the weight of justice for some veteran claimants. Everybody does not get a fair shake. Sometime the BVA does the wrong thing, maybe more than we would like them to do essentially. But essentially under a system which would inevitably come to be managed by professional corporations of lawyers if we had judicial review, we can expect no better performance at a monumentally higher price for the veteran and the VA as well.

Our current views on the issue are consistent with those presented to the HVAC in 1986 which I just summarized. Essentially we believe that the budgetary impact of instituting judicial review would be too seriously detrimental to the substantive programs of the VA to be worth the occasional rectification of mismanagement by the VA administrative adjudicative system. Now I want to point out one other thing that sometimes we ignore. We don't remember too often that we do have judicial review right now. And we don't only have it on insurance, and we don't have it only on loan guarantee, we have it even in the areas of veterans benefits, but we have it and we've had it for many years now relating to issues involving regulations and internal procedures and constitutional statutory authority within the VA.

In other words, if the VA decides to flim-flam around, change a regulation or try to set up a procedural system which is thought to be detrimental to veterans interests and so forth on any number of occasions, challenges have been taken to court and the courts have said they have the right to tell the VA to straighten themselves out. Examples are Johnson against Robison, Plato against Raudebush and Wayne State University against Cleland in which the courts said if you don't do things according to the constitution or

you don't do things according to the statute, or issue regulations without proper notice etc., we are going to tell you to straighten your act out and they have done so on many occasions and that's been a result of people taking cases to the Federal court system. So it isn't as if the VA were completely isolated and completely insulated from being kept tabs on by the courts system. Now the courts can and do frequently get into the act and tell the VA what to do and what not to do. It simply means that the judge does not get into the act and decide whether a guy is entitled to 30 percent or 50 percent disability, in a field that the judge is totally unqualified for in the first place. I think the best thing to do to establish the AMVETS position on judicial review is to read the resolution which we just adopted at our 43rd national convention in St. Louis.

Whereas, Section 211(a), Title 38, United States Code, stipulates that decisions of the Administrator of Veterans Affairs on any question of fact or law under any law administered by the Veterans' Administration which provides benefits for veterans, their dependents and survivors are final and conclusive and not reviewable by any other official or court of the United States; and

Whereas, AMVETS has for several years supported legislation to amend Section 211 (a) so as to permit appeals to the federal court system from decision of the Board of Veterans Appeals; and

Whereas, recently elicited evidence shows that involving the VA adjudicative system in the backlogged and terribly expensive litigation quagmire of the federal courts would impose a heavy cost drain on the already drastically constricted VA budget; and

Whereas, the recent experence of the Agent Orange suit against private chemical companies has demonstrated that opening VA claims to the private litigative system will inure primarily to the benefit of lawyers rather than veterans in need; and

Whereas, the professionally trained veterans service staffs of the veterans organizations are specifically qualified to represent claimants for VA entitlements; and

Whereas, the current restriction was imposed after a long and disgraceful period of claims manipulation by unscrupulous lawyers and others after the Civil War; now, therefore, be it

Resolved, that AMVETS urges that any action on amending Section 211(a) of Title 38, United States Code not be taken until at least the expiration of the deficit amortization period under the Gramm-Rudman Act in 1991.

Now admittedly, like Dick Gallant said about Purple Heart, we are leaving the door open. We are saying in effect not never, but not now, this is too expensive and too dangerous and too unnecessary a thing to have--we'll take another look at it—in another 3 or 4 years down the line. Our minds are open. We may decide to stick with our position then, as it is now. We probably will, but at least we are willing to take another look at it. Thank you.

Statement of James Magill, National Legislative Director, Veterans of Foreign Wars of the United States

What I would first like to do is bring greetings from our Commander and Chief who was in Washington this past week at a number of meetings with Members of Congress; at the Pentagon and State Department. He asked me to extend to you an invitation to conduct your mid-winter conference to coincide with ours on March 4 through 8. We would enjoy having you there with us exchanging views, and we do hope you will be able to meet in Washington at that time. What I would like before I get into our position on judicial review is clear up a lot of misconception about the Vet-

erans of Foreign Wars with the topic that we are talking about now and also just who we represent. I want to make it clear, the VFW represents all veterans, I'm talking World War I veterans all the way through Vietnam. And speaking of Vietnam veterans, we are proud to say that we have over 600,000 Vietnam veterans, now those are Vietnam veterans that have served in-country in combat who are members of our organization. So if you hear that the VFW does not represent Vietnam veterans I hope you will remember what I just said.

With respect to judicial review I'm going to give you a little different slant on our position. As I said before, there was misconception about that position. As you have heard, back in 1986 the House of Representatives held pretty extensive hearings on this. I think, if I am not mistaken, there were 4 days possibly 5 days of hearings on H.R. 585. We took a position of modified judicial review, and that's what I mean by getting into a different aspect of it. The subject of judicial review of veterans claims, as you all know, has been before the Congress for many years. Since the 94th Congress, proposals have been introduced to afford veterans the right to, as we heard the phrase, "their day in court." As the second largest client agency in the Federal Government the VA is one of the few agencies whose decisions are final with no further recourse available to their claimants. As I stated before, we support a modified version of judicial review and that is mandated by our current resolution.

However, this support should not be viewed as our being critical of the VA's claims processing apparatus and it certainly includes the Board of Veteran's Appeals. We have praised its performance in the past and do not see any reason to alter that support. The Board of Veterans' Appeals is under constant pressure for improved timeliness in processing cases and the increasing complexity of its cases such as radiation or herbicide exposure renders for the most part fair and equitable decisions. However, human nature being what it is, errors in judgment or interpretation of law and regulation may occur. For this reason the VFW believes that veterans should be allowed to utilize the court system when certain actions warrant. In 1981 the National Commander of Veterans of Foreign Wars appointed a special committee to study and evaluate the question of judicial review.

As a result of this extensive undertaking the Veterans of Foreign Wars adopted a position supporting judicial review of Veterans' Administration's benefits determinations in instances only concerning questions of law and regulation. The voting delegates to our most recent national convention have reaffirmed that position by approving resolution 613 entitled "Judicial Review." You will be getting a copy of that after I get through. The VFW believes that this narrowly drawn resolution would adequately permit dissatisfied claimants to seek relief in the appropriate court upon exhaustion of their administrative appeals; meaning no law suits could be initiated after the final decision has been rendered by the VA Board of Veterans' Appeals. By limiting judicial review to questions of only law and regulation, we believe a flooding of cases to the Federal courts would be avoided, and at the same time the informal

flexible review procedure currently in place within the VA would be preserved.

It should be noted that the court is not required to hear all cases presented to it. If the petition to the court is not based on a question of law or regulation then the court would refuse to hear the case and the Veterans' Administration decision would stand. We believe this will also eliminate the possibility for de nova review of claims which would encourage an ever increasing number of appeals without merit. Our current resolution addresses the attorney fee schedule issue by resolving any fee schedule associated with judicial review be separate and apart from attorney provision under Title 38 U.S.C. pertaining to VA administrative processes. We believe court review is not needed on alleged errors of fact. The present system has build-in safeguards to protect the best interest of the claimant which includes correction of error at any level of the adjudication process. Again, the Board of Veterans' Appeals is a highly competent body and if alleged errors of fact are presented on appeal the claim is remanded for clarification. If error is discovered in the appeal decision, the Board will accept the case for reconsideration, thus the claimant does get his "day in court."

This concludes what I'll say on the position of the VFW. I appreciate the opportunity to come before you and spell out clearly what our position is. We look forward to working with all of you, and should you have any questions, I'm going to be around this afternoon and I'd be more than happy to talk to you about our position and how we can work with you. Thank you very much.

STATEMENT OF ARTHUR H. WILSON, NATIONAL SERVICE DIRECTOR, DISABLED AMERICAN VETERANS

Mr. ANDERSON. Arthur Wilson, who is a very learned gentleman from Washington, D.C., has been around for a long time and has got a tremendous amount of expertise in the role that he plays as the National Service Director for the Disabled American Veterans and Arthur has with him a gentleman also that is going to be speaking to us, so for initial purposes, Arthur Wilson.

Mr. WILSON. Thank you Leo. Good morning, or good afternoon as the case may be. Initially, I have known Leo Anderson for a number of years. I have worked in Washington now for about 13 or 14 years, and Leo, I want you to know that I take personal offense at your introduction this morning that there is literally thousands of years of experience out there in veterans' service organizations. I don't know who you're talking about. I've been involved in the DAV for about 20 years and I guess if you add my 20 to some others, I don't know whether you're going to come up to a thousand. I consider myself still pretty young in the organization.

Leo and President Gregg, I want you to know how much the DAV appreciates the opportunity to come and be with you this morning and we always will appreciate so much our relationship with the State Directors of Veterans Affairs, both on a national level and, of course, a State level, with all of our State organizations and, of course, our national service officers who work very closely with so many employees of yours.

This is somewhat of a unique setting to be here in Atlantic City this weekend and to discuss many issues of great concern to us and, of course, to you. I feel that we could talk about many issues—we would talk about pending legislation, we could talk about individual programs of veterans' organizations, employment programs, for instance, the DAV's new training program. We could talk about our transportation network, our hospital services coordinators, we could talk about the GAO and its study of the 1945 Schedule for Rating Disabilities. We could always talk about the Inspector General of the VA who, we think, should go back to square one and look for fraud, waste and abuse, as opposed to picking on some widows and older veterans who are getting a buck or two more. The subjects are always something that could be of controversial nature and easily discussed in a setting of this nature.

But you're here today to talk primarily about judicial review and I don't think that I need to stop this little presentation where the expoundation about the DAV's position. In a sense, I know you know what DAV's position is about judicial review, so we though we'd do something different, try something different, this year. I brought with me an individual who serves as DAV's legal counsel in Washington, a gentleman who knows the issues, particularly the issue of judicial review, very well. He's a very learned individual. His name is Joseph Zengerle.

He has worked with us for a number of years. Just by way of a background and historical perspective, Joe is a West Point graduate of 1964, served in the European theatre and eventually served in Vietnam in 1968 as General Westmoreland's special assistant. He commanded a unit in the up country of Vietnam and came back to the United States in 1969. He and his lovely wife Lynda went to Michigan Law School together and they graduated from there in 1972. He served as a law clerk for Chief Justice Warren Burger in the Supreme Court from 1973 to 1974, and now he works with the law firm of Bingham, Dana and Gould in Washington. He served under the Carter administration as an Assistant Secretary with the Department of the Air Force, became very concerned with veteran issues and, particularly Vietnam-era issues. He has taken a great interest in veterans' affairs among other things that he does throughout Washington in his legal career. He is a life member of the DAV and I will present to you for a brief presentation on the subject of judicial review and DAV's position, Mr. Joe Zengerle.

STATEMENT OF JOSEPH ZENGERLE, ATTORNEY-AT-LAW, ON BEHALF OF THE DISABLED AMERICAN VETERANS

Mr. ZENGERLE. Thank you Art. After a break you have an obligation to make sure that everybody's paying attention. There are only a few ways to make sure that that's done, so I thought I would begin with a couple of preambles. The first preamble I wanted to tell you, President Gregg, Leo, and members, how compelling the subject of judicial review is. I got up at 6:30 this morning and went out to the beach to watch the rising sun. You all have just heard that I am a Vietnam veteran and some of you may have seen the movie "Coming Home." I started thinking Bruce Dern type thoughts and as I was swimming into the rising sun, stopped

abruptly and stood up and walked back to the Claridge and said "I can't leave this subject alone." So I had no doubt that I wanted to come here and speak to you about this compelling subject. It brought me out of the water and into the hotel.

It is a dangerous subject to some small degree because we don't all agree as to how we might come out on it. As a result, I thought I would offer you some advice since you are all, I think, politically attuned, if not politically appointed, and, like me when I had my political appointment, I had to worry about what I would do if I got caught in a crack. The advice that I got was very good. I avoided jail. I avoided indictment. I avoided special prosecutors, and it seemed to me it was useful to pass that advice along. The advice was to prepare three envelopes and I soon learned what was in those envelopes and they were extremely helpful to me. I was told when I got these envelopes that I ought to bring them out each time I had a serious problem in government. So I ran into my initial crisis as a political appointee and I hauled out my first envelope and opened it up and it said blame your predecessor. So I blamed my predecessor and the fury went away. I went on to administer the affairs of the office, and I ran into my second crisis at which point without finding a way out I turned to the second envelope and opened it up and it said reorganize. So I reorganized and it seemed to cause all the problems to dissipate and I escaped the second crisis. I approached my third crisis. It was a really tough one and, as I say, you may find yourself in the same situation like this some time down the road, and I was just hoping that my predecessor had provided me with as good advice in the third envelope as I had gotten in the second. So I opened the third envelope and it said prepare three envelopes. So—a word to the wise—but I don't think that judicial review will get you beyond the first envelope anyway.

As to the nature of my remarks, I'll try to keep them brief and easy to understand. From time to time my good friend Don Ivers ribs me as counsel to DAV. He thinks I get paid by the word. He told me that again this morning and I struggled to figure out why he keeps telling me that and I figured out that Don probably doesn't like to read. So what I'm going to do is speak this one and try to make it short.

In all seriousness, I think this issue of judicial review has, at least in the popular media, received pretty one-sided coverage. In defense of the media, I think what has happened over the years is that for an initial period in the 1970's and perhaps into the early 1980's there were national attitudes and other attitudes that were pretty critical of those who served in Vietnam. I think subsequently very many of those attitudes have turned around. We almost have a reversed situation today in that there is rather uncritical acceptance in the popular media of virtually any complaint leveled against the system by those who were in a way victimized by public attitudes and press attitudes that prevailed for a while toward those who served in Vietnam. So, I think, that while I believe the media coverage of this issue has been unfair, I think there is also a compassionate and reasonable explanation for the unexamined acceptance of criticism of the status quo. The hope is that others on the side of the status quo can start to speak out again in a reasonable and sympathetic way to those with whom they disagree and to those whom they hope to persuade of a different view.

I would offer just a couple of points about the current status of veterans' benefits adjudication and the involvement or not of courts in that process which I hope is new because you have heard a lot of good ideas this morning and you will continue to hear some good ideas. I'll try to give you a bit from a more legalized perspective than a practitioner's perspective exclusively in veterans' affairs. I'd like to relate it to some important events going on right now. One is the 200th anniversary of the U.S. Constitution and another is the nomination of Robert Bork to sit on the Supreme Court of the United States. The Bicentennial is a happy event. The nomination of Judge Bork is a compelling event to all of us.

The day before yesterday in the "New York Times Magazine" there was a symposium of a number of distinguished authors on both sides of the political fence to celebrate the Bicentennial and one of those contributors to the symposium was Larry Tribe. Larry is a constitutional expert at the Harvard Law School. He's written a book called "American Constitutional Law" and his piece was on judicial review. The first thing that I think needs to be understood by anyone who approaches the subject is that judicial review has two parts. When most people in this Bicentennial year think about judicial review, they think of it in its classic sense which has nothing to do with the issue before you. The classic doctrine of judicial review was announced by Chief Justice Marshall in *Marbury* v. *Madison* in the 1800's and it asserted, and it has never been withdrawn, the power of the Federal judiciary to declare unconstitutional the acts of the Legislature and the acts of the Executive. That's judicial review.

You have judicial review now. Every allegation of unconstitutional decisionmaking by the VA can get into Federal court. That's been the law since 1974 in the Supreme Court case entitled *Johnson* v. *Robison,* section 211(a), which bars judicial review, was interpreted by the Supreme Court to say that Congress intended 211(a) not to bar constitutional claims against the VA. So judicial review, in its classic sense, is now available to every veteran in America, and I doubt very much that it will ever be withdrawn. I know that if Congress ever sought to withdraw judicial review of constitutional claims, my own client has expressed to me a desire to make sure that doesn't happen because constitutional rights are too fundamental to leave to executive discretionary decisionmaking. That's what the courts are there for.

The problem of judicial review of non-constitutional cases, which for VA claims is termed judicial review of agency action, can be discussed in a couple of different ways. One fundamental way to understand the problem of judicial review of agency action is to refer to Larry Tribe's article in the "New York Times Magazine" 2 days ago. He leads off by saying that in a CBS/"New York Times" poll of Americans, one-third of our citizens don't like judicial review in its classic sense. They oppose judicial review of constitutional questions. A third of our fellow countrymen—that's extraordinary to me. The value of the Federal judiciary in our country in securing to each individual citizen his or her constitutional rights regardless of what the majority thinks, or says, or does in the executive branch or the legislative branch is one of the most fundamental features of our national life. That's where we get our freedoms

from. Freedom from search and seizure, free expression, free speech, insurance that no one takes our liberty or our property without due process of law. The courts guard those freedoms. One third of Americans are opposed to that kind of judicial review. You already have that as veterans.

So we have to worry a little bit, it seems to me, about preserving judicial review in the classic sense. Robert Bork's nomination to some degree puts that question at issue. It's a political question upon which reasonable people can disagree, but the phrases that are used by those who vigorously support Judge Bork and his judicial philosophy talk a lot about judicial restraint, talk a lot about strict construction, talk a lot about original intent. These concepts are all designed to lower the profile of the Federal courts on constitutional questions. So you've got political efforts to minimize the role of Federal courts on constitutional questions and you've got up to one-third of our citizens opposed to judicial review on constitutional questions. The Federal judiciary in it's role in our form of Government to some degree is at stake now.

Here you've got the issue before you today which is judicial review of agency action. If you're already opposed to something so fundamental as judicial review of constitutional questions, imagine how much more vigorous that opposition could be if you also threw on top of it increasing judicial review just of agency action. It's something for you to think about it seems to me. It adds to the rhetoric and the pressure that charges our Federal courts with overdoing their role, and if you believe in our Federal court system, and if you believe in protection of our constitutional rights, one thing that you ought to do is try to minimize the grounds on which the courts' role in our society is being attacked. And I think judicial review of agency action, particularly judicial review of individual adjudications of VA claims, would provide such an avenue for further attacks on the Federal judiciary. The're getting their noses into too many people's business.

When I clerked on the D.C. Circuit for Judge Carl McGowan, I got to know a number of the judges there and one of them was Judge Skelly Wright. Skelly Wright, you may recall, was a Louisiana judge who did some fairly noteworthy things in the area of desegregation and was appointed to the D.C. Circuit partially as a result of that. No one could accuse Skelly Wright of being on what one would call the conservative side of the agenda, and one could fairly claim Skelly Wright was pretty far on the other side of the political agenda as a judge. Skelly Wright, writing in the 1980's about judicial review of agency action, which is the subject before you today, said in order to preserve the legitimacy of the role of the Federal courts on judicial review of constitutional questions, we, the Federal judiciary, have to back off judicial review of agency action. We have to minimize it, we have to cut it back, and he spoke very authoritatively because the D.C. Circuit is the most significant court in the Nation, short of the Supreme Court, on judicial review of agency action. It seemed to me useful to give you that perspective as one rather exclusively legal view of this question, an important question that's before you.

Another point to make is to ask yourself, in a cost-benefit sense, what do you pay and what do you get if you impose judicial review

of agency action, judicial review of individual benefit determinations? Before I get into the veterans' service organization system and the unique advantages it poses and the great benefits it provides, again from a rather uniquely legal perspective, I'd offer one opinion from the Court of Appeals for the Second Circuit in New York which, within the last 6 months, rendered a significant series of appellate decisions regarding the Agent Orange settlement coming out of Chief Judge Jack Weinstein's trial court in Brooklyn. One of the things the Second Circuit said with respect to that very sympathetic group of claimants was in reversing the trial court's desire to establish a philanthropic foundation to spend a substantial part of the settlement fund for good works. The Court of Appeals said about that foundation, and about the lawsuit across the board, that the plaintiff's are seeking larger remedies in emotional compensation beyond the power of courts to provide. I don't think anybody in this room would deny the extremely sympathetic basis for the claims of many veterans who get no relief from the VA, and Agent Orange claimants occupy a good portion of those frustrated claimants who bring to the table broken lives, unhappy lives and lives burdened with great pain. Children with birth defects, wives who have suffered miscarriages, themselves veterans with cancers and other problems, liver disorders, they can't get relief. They want relief.

To me, and the Second Circuit in this case, the place to get that relief in American society is not the judiciary, because when the judiciary reviews frustrated claimants' appeals to the courts from agencies, all the courts can do is faithfully interpret the statutes that the Congress enacts. If Congress in its wisdom or its lack of wisdom fails to provide a basis for granting benefits, there is nothing the courts can do. They are not in their constitutional role in which they can overturn Federal statutes. When the courts are reviewing agency action, they have no constitutional power and those who are seeking judicial review today do not present constitutional cases. They present agency action cases in which the courts will review statutes, and they can't go beyond the statutes, which means they can't go beyond what the Congress wants, for good or for bad. You'll hear a lot of loose-lipped talk about due process. I guarantee you that if a veteran has a good due process claim he can get to court. If a veteran has a statutory claim or a regulatory claim or an adjudicative claim that does not have a due process basis or a First Amendment basis or an equal protection basis, he is not over here in the court's classic role of judicial review of constitutional claims in keeping the executive branch and legislative straight, he's over here arguing that—gee, the VA didn't pay me and they should have paid me because this is what the regulation says and this is what the statute says. The court then has to read the regulation and the statute and see what it says and determine from that. Many of the most sympathetic, frustrated veterans don't have a good statutory or a regulatory claim to make and the courts can't do anything for them. That's what the Second Circuit said when it reversed the Agent Orange settlement. These plaintiffs seek larger remedies in emotional compensation beyond the power of courts to provide.

So one reason that you ought to think about in judicial review is don't add fuel to the fire in which already a large number of Americans don't even like courts in the classic role of constitutional interpretation. Another thing to realize is that courts really can't provide compensation in many non-constitutional cases. When somebody stands up and says these cases are too complex for service officers to bring effectively, read into complexity a different concept. I would read into complexity the concept that Congress and the VA are not sure that the claimant is entitled to anything in this kind of a case. The medical community, the scientific community, are unsure and so they create all these hoops, all these hurdles, all these criteria and factors to try to make sure that they can confine those claims the best way they know how. It's still very difficult and if the courts get a chance to review those cases where the claimant doesn't get his benefits, they're going to have to go through the same trellis work of regulations and statutes to come to the conclusion that they can't do anything more than repeat what the Congress said. We're not sure there is a basis for a claim here, we're not sure there is service-connection here.

DAV has struck directly at it, and this gets into the last part of my remarks. One of the best examples of how to attack that kind of a problem is not through the courts, it's through the veterans' service organizations and through the system that currently operates today. In 1978, I believe it was, DAV stood behind and energized the first public hearings by the Congress on the atomic veterans' claim for compensation based on their exposure to ionizing radiation from the atomic bomb blasts in the Marshall Islands and in Nevada, and in the occupation forces after World War II, in Hiroshima and Nagasaki. That was 9 years ago. Nine years later, continuing the legislative struggle and recognizing a continuing lack of consensus on service-connection for radiation claims, DAV, along with other good and fine supporters in the service organizations and the Congress, stood behind presumptive legislation for substantial benefit relief for most of the radiation-type illnesses that have been claimed against the VA over the last 10 years. That legislation is right on the edge of passage now. What this represents is the uniqueness of veterans' service organizations that is not really recognized in the judicial review debate.

We're going to pass out at the end of this brief set of remarks a 2-page handout that appeared last month in the "National Law Journal." The name of the article is "Vets are Helped" and it talks a little bit about the theory that I'm going to mention to you now. That has to do with this unique function of service organizations. You hear oftentimes that there is a right for every person to get into the court. Every American has his day in court. I think that a day in court as a concept is part of the American fabric of citizenship, but it doesn't mean technically "court." What it means, as all phrases like that mean, is that any individual with a grievance has a place to go to get it heard. It doesn't have to be a court. The basis for that phrase didn't emanate from and is not limited by the inadequacy of language. A day in court means that if you've got a complaint you have a place to take the complaint and find a remedy. In my view, the service organization structure provides that remedy in two truly unique and valuable ways.

The first way that most people don't think about is to recognize that the service organizations have enormous influence in the Congress. Millions of members, they all served their country and that commitment creates a family structure so that the person who served, be it man or woman, is probably a voter, probably runs a fairly tight ship at home, spouse is probably a voter. By now, with so many of us advancing in age, the Vietnam veteran is 40 today, may well have some voters among the children. A lot of dependents out there getting veterans' benefits. You have a community of tens of millions of Americans, maybe close to 100 million Americans served by the VA in one way or the other. That's awfully powerful electoral influence before the Congress. Think about the constituency of the Congress itself. How many Members of Congress do you know who served in the military? Large numbers.

Let me just show you how to contrast that with the false analogy that's made by some of the proponents of judicial review. Have you ever heard those proponents stand up and say illegal aliens get judicial review, Federal prisoners get judicial review, why don't veterans get judicial review? Well the answer to that, in part, it seems to me, is that illegal aliens aren't Members of Congress, Federal prisoners aren't Members of Congress, veterans are, and veterans have organizations that have enormous influence on the Congress. So the analogy doesn't hold, it collapses. Illegal aliens and Federal prisoners need courts. Veterans don't need courts because they have their own check-and-balance. Under the constitutional concept of checks-and-balances, service organizations are the check-and-balance. They perform a quasi-governmental function. They are chartered by the Congress to perform a quasi-governmental function. That function is the check-and-balance function.

Service organizations arose basically during the New Deal. The VA was created in 1930. The Legion, the VFW, the DAV were all chartered between 1918 and 1936. So it all came together during Roosevelt's first term, Franklin Roosevelt. By 1940, the Attorney General's Committee on Administrative Procedure said that the service organizations were so effective that when they see claims regularly being denied, they go to the Congress and they change the law. If they see deviations in basic policy, they go to Congress and change the policy. The Attorney General's committee in 1940 said if it comes to a head-to-head conflict between the VA and the service organizations, service organizations are going to win. That political influence has real legal meaning. It's the quasi-governmental function. It's a check-and-balance function. It substitutes for the courts. You get your day in court, at least at the legislative end through the service organizations, through the memberships, through the democratic process, through the national conventions, through the legislative platforms.

In no other case in the American Government does the Congress hear from any other interest group in America like it hears from veterans. The process of the budget starts with the President's state of the union address, after which be leaves a ton of paper before the Congress which is his budget request, after which all the President's minions go before the Congress. I've done that, as a minion of the President, testifying before appropriations committees and authorizing committees. In no other case that I know of is

there a regular practice in which the authorizing committees of the House and the Senate join together and call before it any group other than the veterans' service organizations to hear their legislative proposals placed side by side with that of any administration, Republican or Democrat. It seems to me that that speaks uniquely to the powerful influence of the quasi-governmental function of the service organizations.

I would further remark that the Supreme Court has recognized that kind of a special role. In 1985, in *Garcia* v. *San Antonio*, the Supreme Court looked at the Congress' effort to impose labor standards on the States. There was a big controversy because in an earlier case, *National League of Cities* v. *Usery*, the Supreme Court overruled the Congress' power and said, under the 10th amendment, the States have certain things they can do for themselves, traditional government functions. Congress can't touch that. In the *Garcia* case, the Supreme Court reversed *Usery* and said Congress can do this to the States and the courts can't overturn it. A liberal majority of the Supreme Court, Justices Brennan, Marshall, Blackmun, White and Stevens, said in *Garcia* that judicial review disserves democratic principles of self-government. We don't want the courts in on this business. And the reason they said that is because the States were found to have enormous influence in the Congress already. Each of them have two Senators and other structural, constitutional influence in the legislative body. When you have legislative influence, the need to have courts diminishes, even in constitutional cases. And don't forget, concerning VA claims, we're not talking about constitutional cases, we're talking about review of agency action.

The other unique aspect of the service organizations that exist to my knowledge in no other area, is the system of free representation. Art runs a body of 260 paid, non-lawyer, professional service representatives that provide first-rate representation before an agency that's ready to bend over to help the veterans, although that doesn't mean it happens in every case. Anybody who looks at a system that adjudicates 5 or 6 million claims a year can stand up and scream bloody murder about a dozen or two dozen anecdotes in which things didn't work out right. And if you just look at the dozen or two, you say, my lord, that system's really screwed up. But if you realize that the dozen or two comes out of an annual workload of 5 or 6 million claims, you could step back and get a sense of proportion about how badly screwed up that system is or how badly screwed up it is not. And I don't think the case has been made that this system is as broken as people make it out to be.

I've mentioned two things so far. Systematic considerations for you to take into account. Let's not open up more judicial review on the agency action side and prejudice judicial review of constitutional claims, the core function of the Federal judiciary. And let's realize that on the agency action side, there's not a lot the courts can do if Congress doesn't want to give the benefit, as in the Agent Orange case the Second Circuit determined.

The second thing I mentioned is the uniqueness of service organizations. Their truly significant quasi-governmental function derives from their legislative power that distinguishes it from any other system of justice in America. And that gives the true meaning to

alternate dispute resolution mechanisms, that the whole bar of the United States is concerned about and interested in. Short anecdote on that. Realize that in Florida where you get courts into the process, malpractice insurance is now $192,000 a year for neurosurgeons and it took one woman who was shot in the head 23 hours to find a neurosurgeon who would take her case. Courts and lawyers are not always the best solution.

The final thing that I would like to mention are the intangible values, and I'll close quickly. Those two are these. Veterans run the system today. The proposal before you would put the system in the hands of courts and lawyers, and I would suggest that there is a powerful intangible value of veterans as veterans running the veterans' benefits system, in part, because of the self-esteem it gives every single one of you and me and all the veterans around the country that want and need assistance from their government. Let's not take that away from the veterans and make them believe that they need to go to somebody else to get it. Let them understand that they can do it themselves and that their government will help get it for them.

Finally, on the intangible side, Justice Powell wrote in this last spring term, just before he stepped down, in a Federal tort claims act case, too many suits can undermine the commitment of those who serve the nation in uniform, and I think that that's an intangible value that you ought to consider. Imagine, a proliferation of lawsuits against the Veterans' Administration, and the impact that that would have not only on the veteran community, but on the non-veteran community that contemplates national service. Would they think that the social contract was broken? Is that a fair thought for them to have, given the way the system now works? We all need to think about these intangible things. I always think about Rupert Brooke in World War I and his poem in which he says, "If I should die think only this of me, that there's some corner of a foreign field that shall be forever England." Those ideas touch all of us because we gave some part of ourselves in service to our country, and I'd hate to change the system and create an idea that somehow that vibrant relationship between the citizen and the government that he served and fought for, got hurt for, and perhaps died for, was so broken that we needed to sue it on a regular basis. I think veterans deserve more and better than that. Thank you.

STATEMENT OF JACK POWELL, NATIONAL EXECUTIVE DIRECTOR, PARALYZED VETERANS OF AMERICA

Judicial review is an issue that clearly is one the veterans organizations are united in opposition to. For anybody that has been involved in veterans services for any period of time at all it is in itself a unique statement. On judicial review, I have decided to make an acronym for this issue to explain why the Paralyzed Veterans of America opposed judicial review. The word is "veteran" and I'll come back to each one of those letters in a few minutes and also the acronym for judicial review. I want to take a moment to talk about a few other things that are not specifically on judicial

review. Joe Zingerle, when he was up here, talked about the influence of veterans. This year you may know that four veterans organizations, the VFW, the Disabled American Veterans, Paralyzed Veterans of America and AMVETS got together behind an independent budget for the Veterans' Administration, limited specifically this year to medical care and some general comments on construction.

At the time that we got together to propose an independent budget it was because the Veterans' Administration budget had been under declination for well beyond a decade and because the President had released a pass back that showed in fact a $1.2 billion reduction in Veterans' Administration budget function 700. $900 million was added to that before it was even sent up to Congress because of the howl and cry from the veterans community. Today we are in a position in which the budget is going to be passed for the Veterans' Administration is only about $200 million less than what the veterans' organizations asked for in their independent budget. There is an Administrator of Veterans' Affairs, with whom I disagree, who states that magically somehow Congress just drops $400 million out of thin air for no reason at all on the Veterans' Administration. That the VSO's work in their independent budget effort and lobbying Congress had nothing to do with this, and that the Congress just woke up one morning and said let's give them another $400 million—if you believe that, would you please raise your hand so I can talk to you after the meeting about some real estate because that isn't the way it works.

A few years ago when I first met Joe Zingerle we were involved in another piece of litigation and that was from a group called Citizens for Taxation with Representation, I don't know if any of you remember the case, but a non-profit organization was suing the President on the basis of the fact that veterans service organizations were able to lobby Congress, but still remain not-for-profits and be tax deductible and they thought that was not not fair, they felt it was taxation without representation. Congress passed a joint resolution very quickly that stated no, veterans service organizations do in fact serve a quasi governmental function and in the court case handling that piece of litigation, the court also decided and stated very clearly that the veterans' service organizations perform a function to the Congress and to the Nation that could not be replicated for hundreds of millions of dollars and for that reason there was no problem with the constitutionality of the laws that provide an opportunity for veterans organizations to testify before Congress on the needs of veterans and still be tax deductible entities.

So veterans' service organizations, and I'm preaching to the choir here, do a heck of a lot. Coming back to the issue of judicial review people have talked about what the other side says. The other side says it's more timely, they say it would be fair to have judicial review because no single administration or people from a previous war who were biased about that would impact on this. I want to point something out to you, by the way, that hasn't been pointed out here. Who is it that is so staunchly in favor of judicial review? What organizations major issue is judicial review? I sat at a joint session of the House and Senate Veterans' Affairs Committee and

listened to that organization testify. You want to know what they said? They said the Veterans' Administration budget is big enough, is more than enough money, as a matter of fact, it can be cut some. The problem, in their opinion, is that we just spend the money on the wrong people. If we forget about the Korean War veterans, and World War II veterans, and World War I veterans, and just spend the money on Vietnam veterans, there will be plenty of money and that was the president of that organization testifying before a joint session of the House and Senate Veterans' Affair Committee.

I have a real deep personal problem with that because the thing that makes this country strong is when we all feel like citizens, and the thing that makes veterans strong is when we recognize, and this is the first of those letters of the acronym "Veterans" that veterans come from all periods of service and all periods of war. Not one war, not another war, not the most recent war and not the longest war and not just war and no war. To me, one of the problems is that we are forgetting the major class of new veterans today. I think that we are abandonding those veterans who served since the end of the Vietnam War period.

Under the system that we work under today, the guy who was standing on the fantail of the U.S.S. *Stark* and didn't get hit is entitled to nothing except "peace time" veterans benefits. I remember a couple of years ago an Administrator talking about why penalize the boys who climbed the hills on D-Day because they didn't get hit on D-Day. They were there and they served then, why penalize that young sailor on the back of the *Stark*. That's something that we ought to be looking at and we ought to be seriously paying attention to. We ought to be paying attention to the reasons why do members of embassy delegations receive special incentives for the hostile nature of their duty assignments when the young Marines on the gate receives not one dime difference for being there or being in Chicago or Washington, D.C. I think we are forgetting about these veterans right now.

Another point of my test on this legislation was quality. What I mean there is that veterans with similar problems get similar awards. This would be likely to change under judicial review. So the second of those letters "E" is for equality, the third is "T" for treatment. Right now we have a system in which whether it always works or not, the benefit of the doubt is to be resolved in behalf of the veteran. That is not the system that you teach young lawyers as they go through law school. You teach young lawyers to win, and if you are supervising a group of lawyers you promote or reward on the basis of whether they won or whether they lost, not on how well they played the game, because that isn't the way its done and the game they are playing is the veterans future.

The fourth letter again is an "E" for equitable treatment for veterans. What do I mean by equitable, veterans, especially combat veterans, are unique. They should be considered uniquely and separately. All veterans should be considered separately from the rest of society. There is in my mind, a substantial difference between the loss of a little finger in a skating accident and the loss of a little finger because it was run over by a tank tread while you were serving this Nation, so the basis of going into court and letting a lawyer argue that the usual award given under the workmans com-

pensation system in "X" State for the loss of a little finger is this and that's what the veteran ought to receive, is not appropriate. But that ties right into the next letter which is "R", which stands for rating schedule. To many of the people that I talk to, that work on veterans benefits, their most current fear is the idea that the rating schedule may be significantly changed. In this time of fiscal constraints, the likelihood is we will forget veterans to save dollars. We know that there are many people, some in Congress, in OMB, and in the private sector, who have vested interest in saving money for the Treasury or for themselves by reducing compensation through changing the rate schedule.

The "A" in veterans to me stands for Americans because Americans have made a commitment to veterans. There is no question that the typical American citizen thinks that veterans are something special—something unique and something to be honored as a class. That's a good thing because for some of us who became veterans during the Vietnam period, it wasn't always thus. Americans have made a commitment.

That brings us to "N" which to me is, nobody, but the Congress and the President should have the right to change the commitment that the American people have made, and that is what you create if you start letting a single man or woman in their black robes make the decision on what a nation owes a veterans and that is how I got "veteran".

Judicial review is not the burning issue for an overwhelming majority of veterans. It certainly is not the burning issue for the veteran who once a month receives a check in the mail because he feels the system has done him well in most instances. It is not the burning issue for most of the veterans you will see in a hospital bed in a VA hospital or in a nursing home or outpatient clinic. If there is a burning issue for many of these veterans, it is the issue of health care and access to that health care and that is where we ought to be spending our time. However, if we work actively for increased levels of funding, training and staffing for the Department of Veterans' Benefits judicial review will come about from the collapse of the system on it's own. It doesn't take a lot of examination of the increasing delays in claims processing time to realize that we are facing serious problems in ensuring a fair and timely resolution to a veterans claim. If in fact you should decide that the judicial review is not the way to go, the single most important thing you can do is to ensure that there is always a well trained, well staffed enlightned Department of Veterans' Benefits. Because as long as veterans have that, there is no need for judicial review.

Thank you very much.

STATEMENT OF JOHN ADAMS, NATIONAL VETERANS' AFFAIRS DIRECTOR, THE NON COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES OF AMERICA

Issue.—Should Federal courts be allowed to decide questions of law and the constitutionality of pertinent statutes and regulations relating to veterans claims. Also by making such determinations, should the court be allowed to uphold or set aside actions of the

VA based on presentation of evidence or findings of fact or conclusions of law.

Background.—Legislation calling for judicial review of veterans claims has been introduced in Congress each of the past 7 years. The Senate has passed legislation regarding this issue 4 of the last 7 years. The House has not adopted any form of this legislation in any of these same 7 years.

Discussion.—The Board of Veterans' Appeals performs its function very much like a court of law. It receives evidence, testimony when appropriate, and provides its determination after objective consideration of the presentation made by the VA and the veterans or his or her representative. The BVA conducts their fact-finding and evidence hearings on an informal basis.

Concerns.—NCOA believes the informality of hearings provides the veteran an undeniable advantage in their appeal; NCOA is concerned that an adverse atmosphere could develop between the veteran and VA employees should litigation in Federal Courts become a fact; As U.S. District Courts are overburdened, NCOA has grave reservations about the ability of the court to be responsive to veterans needs; NCOA believes that the courts lack the expertise and understanding to deal with many veterans issues; Given the number of U.S. District Courts (more than 80), NCOA is concerned uniformity in decision will suffer tremendously. NCOA is concerned that the veterans protection from unscrupulous attorneys, in their dealings with the VA, provided by law since 1862 would be to no avail; NCOA believes accredited national service officers are as capable as any attorney in case development and offering supportive testimony on behalf of their claimant in the current claims process; and NCOA is concerned that in contingency cases, should an attorney receive a percentage of the claimants compensation and compensation be increased at a later date, through no effort on the part of the attorney, that we would conclude that the attorney would be unjustly rewarded.

Associated information.—Perhaps the most eloquent argument against involving attorneys was quoted in the Supreme Courts decision in *Walters* v. *National Association of Radiation Survivors* rendered on June 28, 1985.

> To be sure, counsel can often perform useful functions even in welfare cases or other instances of mass justice; they may bring out facts ignored by or unknown to the authorities, or help to work out satisfactory compromises. But this is only one side of the coin. Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the government to provide one—or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy . . .
>
> These problems concerning counsel and confrontation inevitably bring up the question whether we would not do better to abandon the adversary system in certain areas of mass justice . . . While such an experiment would be a sharp break with our tradition of adversary process, that tradition, which has come under serious general challenge from a thoughtful and distinguished judge, was not formulated for a situation in which many thousands of hearings must be provided each month." Friendly, "Some Kind of Hearing," 123 U. PA. L. Rev. 1267. 1287–1290 (1975).

The Supreme Court also concluded:

It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys. And this additional complexity will undoubtedy engender greater administrative costs, with the end result being that less government money reaches its intended beneficiaries.

Essentially the court reached the conclusion that veterans service officers fulfilled the need to be competently represented.

It would take an extraordinary showing of probability of error in the VA's present benefits claim procedures—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law * * * the evidence before the District Court as the success rates in claims handled with or without lawyers shows no such great disparity as to warrant the inference that the fee limitation violates the Due Process Clause of the Fifth Amendment.

In rendering its decision on the constitutionality of attorney fee limitations the Supreme Court also reviewed the claims process. Indeed, it not only found the fee to be constitutional but also concluded it to be desirable. The Court in its opinion also commended the claims system as an alternative to thousands of civil cases in a system which was not designed to handle such issues.

Summary.—Recognizing NCOA has not addressed the "rules of evidence" or "timeliness of submission" that could be found to be detrimental to claimants, in the Federal Court System, NCOA must remain steadfast in its opposition to judicial review as currently proposed, given our stated concerns.

STATEMENT OF RICHARD E. O'DELL, NATIONAL VICE PRESIDENT, VIETNAM VETERANS OF AMERICA

We have talked the issue of judicial review of the Veterans' Administration to death for years. Quite honestly, the issue is really very simple. It is a matter of fundamental equity and fairness that has a direct impact on the 28 million veterans in this county.

There is something inherently wrong with our treatment of veterans. We have a veterans benefit system that denies them full access to the very constitutional rights that they, as former members of the U.S. Armed Forces, had sworn to uphold and defend with their lives if necessary.

For a number years, I have worked with veterans and with veterans' claims. I think each of you, as is the case with me, have seen veterans' claims denied by the VA, when by any reasonable standard the claim should have been granted. Sadly, these veterans have little protection against such capricious and arbitrary decisions. Unfortunately, their cases go unresolved and remain as a bitter reminder to the individual veteran that there is no apparent justice for an otherwise legitimate claim.

There has been much discussion about the doctrine of reasonable doubt within the current system of adjudication of veterans' claims before the VA. I believe each of you are aware that the application of reasonable doubt in resolving a veteran's claim is the exception rather than the rule in your own VA Regional Office.

Generally, the application of the doctrine of reasonable doubt does not fully come into play until the veterans' case comes before Mr. Eaton's Board of Veterans' Appeals. As each of your know, it is of course incorrect to assume that all veterans appeal erroneous adverse decisions to the BVA. Too many become frustrated with the seemingly endless bureaucratic maze and simply abandon worthy claims in frustration and despair.

In reviewing decisions made by the BVA, as I am sure each of your have, there is adequate reason to question some of these final decisions. To cite but one category, let us consider cases of individual unemployability. In many cases the evidence of record leaves no doubt that the veteran is unemployable. Yet, in many of these cases the BVA simply dismisses the issue of unemployability by simply stating, without explanation, that the veteran is employable. Clearly, judicial scrutiny of some decisions made by the BVA would be in the best interest of this nation's veterans.

In your hearts, I believe that each of you want equity and fairness for the veterans of your State. This is a goal that is both right and essential in your responsibility as public servants for the veterans of your State.

As you move to address the issue of judicial review of the Veterans' Administration, I would leave one simple thought with you.

Each of us in this room has dedicated our adult life to doing what we believe to be in the best interest of the veterans we serve. Therefore, I hope the majority of you will stand with me to help veterans realize the same right of court access as is accorded to other classes of our citizens.

In closing, there is a personal story of equity and fairness that I desire to share with you.

I entered the Army on April 21, 1967 in Atlanta, Georgia. That day there were twelve of us sworn in. There was a thirteenth man we expected to appear that day. As a matter of fact, one week late he appeared in Houston and refused induction into the Army.

Like many others, I spent years in the military and was honorably discharged. Even today, some 20 years later, Like all other veterans, I do not have access to the courts of this nation to redress grievances rooted in my military service.

During almost 4 years of military service I endured the bitter cold of a European winter to safeguard the West German border. Following service in Europe, I became a combatant in an attempt to save the Republic of South Vietnam. Yet, during this same time the thirteenth man, the one who had refused induction, successfully waged his war against induction and imprisonment in the courts of this land.

I am not here to argue whether or not the actions of the thirteenth man, Cassius Clay or Muhammed Ali, former heavyweight boxing champion of the world, were right.

But I do say that if we can afford as a nation to provide judicial protection to those who refuse to serve in the military; there is no logical or moral reasons not to accord the same right to those who did serve.

Clearly, the issue of judicial review of the Veterans' Administration is simply a matter of equity and fairness for those we serve. Thank you.

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